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Chapter 1

A Beginning

1. The opening statement

The privilege of opening the first trial in history for crimes against the peace of the world imposes a grave responsibility. The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated. That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason.¹

A privilege,² a momentum,³ a solemn occasion,⁴ a tale of horror;⁵ when opening an important international judicial event that affects people's hearts and minds and touches upon the great philosophical themes of truth, justice, and humanity, we can think of many things to call it. However, the generic way of referring to the beginning of an international criminal trial is rather uninspiring; it is most often simply called 'the opening statement.' Adding to this unrevealing name, Judge Orie at the International Tribunal for the former Yugoslavia (ICTY) noted that 'everyone is fully aware of what an opening statement is.'⁶ This unspecific description is illustrative of the lack of academic as well as legislative attention to the phenomenon of opening an international criminal trial and it contradicts its striking content and form. The opening statement appears to be a historical moment as well as a habitual practice, yet what it exactly is, remains ambiguous: it is both political and non-political;⁷ argumentative and non-argumentative;⁸

¹ R.H. Jackson, 'Opening Statement before the International Military Tribunal', *The Trial of German Major War Criminals - Proceedings of The International Military Tribunal Sitting at Nuremberg* (1945), 49.

² Ibid.

³ Trial Lawyer Nick Kaufman in B. Stevens, 'The Prosecutor', (White Pine Pictures, 2010).

⁴ SCSL, *the Prosecutor v. Sam Hinga Norman, Moinina Fofana and Allieu Kondewa* (hereinafter: CDF), SCSL-04-14-T, Transcript 3 June 2004, opening statement of the Prosecution, p. 6.

⁵ SCSL, *the Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (hereinafter: RUF), SCSL-04-15-T, Transcript 5 July 2004, opening statement of the Prosecution, p. 19.

⁶ ICTY, *the Prosecutor v. Ramush Haradinaj et al.*, IT-04-84, Transcript 5 March 2007, p. 356.

⁷ K.H. Snedaker, 'Storytelling in Opening Statements: Framing the Argumentation of the Trial', *American Journal of Trial Advocacy* (1986) 10 43. See also SCSL, *the Prosecutor v. Sesay et al.*, SCSL-04-15-T, Transcript 5 July 2004, p. 5; ICTY, *the Prosecutor v. Haradinaj et al.*, IT-04-84, Pre-Trial Conference, Transcript 1 March 2007, p. 342-3.

⁸ J.A. Tanford, *The Trial Process: Law, Tactics and Ethics*, 4th ed. (LexisNexis, 2009), 7; Snedaker (1986) 15.; 'Opening statement', (n.d.) *West's Encyclopedia of American Law*, edition 2. (2008), online at <http://legal-dictionary.thefreedictionary.com/opening+statement> (last visited: 8 February 2017).

a mere introduction as well as a crucial roadmap.⁹ Moreover, due to its relatively high media coverage,¹⁰ the opening statement appears to be the moment *par excellence* to address not only the participants inside the courtroom, but also all other audiences that international criminal trials claim to serve: the victims of mass atrocity, current and future perpetrators of international crimes, and the international community at large. In a way, the opening statement seems both crucial and irrelevant to the trial. These statements are not part of the ‘actual’ legal proceedings, but at the same time they transpire the big ideas behind the procedures and defend the relevance of the trial, the tribunal, and international criminal law (ICL) like no other moment in the courtroom process. Opening statements have to focus on a particular case and are subject to procedural constraints, but cannot omit the broader social and historical context.¹¹ They are both less than law and more than law.

The focus on such a taken for granted practice, that is both overexposed and underexplored, fits with an increasing call in international legal academia to slow down, zone in, and pay attention to detail. If we truly want to understand what it is that we do when we do international law, we have to carefully consider all practices that make up the field.¹² More specifically, this research connects to an emerging recognition of the need to look at the discourse of international criminal law and international criminal justice more closely and more comprehensively, beyond a narrow focus on rules and decisions.¹³ When assessing the power, the weaknesses, the benefits, and the

⁹ G.R. Powell, 'Opening Statements: The Art of Storytelling', *Stetson Law Review* (2001) 31. See also 'Opening statement', (n.d.) *West's Encyclopedia of American Law*, and chapter 3, p. 61.

¹⁰ See S. Vasiliev, 'The Trial', in L. Reydam, J. Wouters & C. Ryngaert (eds.), *International Prosecutors* (Oxford University Press, 2012), 748; C. Schwöbel-Patel, 'Spectacle in International Criminal Law: The Fundraising Image of Victimhood', *London Review of International Law* (2016) 7. The opening day of the IMT was at that time the best-covered event by journalist ever, see B.K. Feltman, 'Legitimizing Justice: The American Press and the International Military Tribunal, 1945–1946', *Historian* (2004) 66 307.

¹¹ Snedaker (1986) 41.

¹² See for example F. Johns, *Non-Legality in International Law: Unruly Law* (Cambridge University Press, 2013); J. Hohmann and D. Joyce (eds), *International Law's Objects: Emergence, Encounter and Erasure through Object and Image* (2017, forthcoming); L.J.M. Boer, 'International Law as We Know It: Cyberwar Discourse and the Construction of Knowledge in International Legal Scholarship' (Doctoral Thesis, Vrije Universiteit Amsterdam, 2017); G. Simpson, 'The Sentimental Life of International Law', *London Review of International Law* (2015) 3; L.J.M. Boer and S. Stolk (eds), *Illuminating the Backstage of Transnational Legal Practice* (forthcoming).

¹³ W.G. Werner, '“We Cannot Allow Ourselves to Imagine What It All Means”: Documentary Practices and the International Criminal Court', *Law and Contemporary Problems* (2014) 76; D. Robinson, 'Inescapable Dyads: Why the International Criminal Court Cannot Win', *Leiden Journal of International Law* (2015) 28; M. de Hoon, 'The Law and Politics of the Crime of Aggression' (Doctoral Thesis, Vrije Universiteit Amsterdam, 2015); M. Glasius and T. Meijers, 'Constructions of Legitimacy: The Charles Taylor Trial', *International Journal of Transitional Justice* (2012) 6; T. Meijers and M. Glasius, 'Expression of Justice or Political Trial?: Discursive Battles in the Karadžić Case', *Human Rights Quarterly* (2013) 35; S. Kendall and S. Nouwen, 'Speaking of Legacy: Toward an Ethos of Modesty at the International Criminal Tribunal for Rwanda', *University of Cambridge Faculty of Law Research Paper* (2016); E. van Sliedregt, 'International Criminal Law: Over-Studied and Underachieving?', *Leiden Journal of International Law* (2016) 29 5 and 12; I. Tallgren, 'The Sensibility and Sense of International Criminal Law', *European Journal of International Law* (2002) 13; Schwöbel-Patel (2016); N.M. Rajkovic, T. Aalberts, and T. Gammeltoft-Hansen (eds), *The Power of Legality: Practices of International Law and Their Politics* (Cambridge University Press, 2016).

dangers of international criminal courts and tribunals, we cannot confine ourselves to the study of doctrine and judgements without asking the question of how the story of international criminal law is told, where it is told, and by whom.¹⁴ We have to consider the practice in its entirety; its traditions, its oratory, its stories. Such scholarship critically examines which narratives are produced and reproduced. What do these stories reveal, and what do they obscure? One of those prominent narratives is the opening statement of the prosecution, yet it is largely ignored as a subject of study.¹⁵ Therefore, the main aim of this dissertation is a simple one: to illuminate the story about international criminal law that is told in the opening statement of the prosecution and to analyse what this story is doing. The analysis purports to shed light on the patterns and shortcomings of an undiscussed practice, because I think there is value in that as such, but also to contribute to 'a better conversation that can generate better insights' about ICL.¹⁶ A more detailed study of its stories can lead to a better understanding of the field, and while the aim is not to make concrete recommendations for improvement, the analysis means to create some fertile ground for (self)reflection and criticism. This introduction shortly elaborates on the meaning of this approach and the type of research it implies (section 2), introduces the legal framework that regulates the practice (section 3), and presents the outline of the dissertation (section 4).

2. The approach

This study assumes a narrative quality to all human utterances, especially to predominantly linguistic practices such as trials. It acknowledges the literary character of law's activities¹⁷ and the

¹⁴ See also J. Dobson and S. Stolk, 'The Prosecutor's Important Announcements; the Communication of Moral Authority at the International Criminal Court', *Law, Culture and the Humanities* (2016).

¹⁵ The few studies that take the opening statement as their main subject of analysis are mainly focused on Anglo-American domestic trials. See for example Snedaker (1986); Powell (2001); J.R. Lucas, 'Opening Statement', *University of Hawaii Law Review* (1991) 13; K. Chaemsaitong, 'Interactive Patterns of the Opening Statement in Criminal Trials: A Historical Perspective', *Discourse Studies* (2014) 16; S.C. Spiecker and D.L. Worthington, 'The Influence of Opening Statement/Closing Argument Organizational Strategy on Juror Verdict and Damage Awards', *Law and Human Behavior* (2003) 27; T.A. Pyszczynski and L.S. Wrightsman, 'The Effects of Opening Statements on Mock Jurors' Verdicts in a Simulated Criminal Trial', *Journal of Applied Social Psychology* (1981) 11.

¹⁶ Robinson (2015) 324.

¹⁷ J.B. White, *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law* (University of Wisconsin Press, 1989), xii; Simpson (2015) 8. The question about the relation between law and arts is as old as times. See for example E. Buis, 'How to Play Justice and Drama in Antiquity: Law and Theater in Athens as Performative Rituals', *Florida Journal of International Law* (2004) 16. Simpson (2015) noted that 'we live in a period in which it is harder to unite literature, myth, theatre, law and political life than it was, in, say, the classical period, and this represents a loss for us.' (p. 7), but indicates in the accompanying footnote that, on the contrary, there might also be an emerging tendency (including his own piece) to (re)unite them. While not the focus of this study, opening statements often tend to flirt with the Arts by citing poets, writers, and philosophers. For example, Justice Jackson finishes his statement with a quote from 'The Old Issue', a poem by Rudyard Kipling. In *CDF*, p. 31, the prosecutor cites Steve Bantu Biko (who cites Karl Jaspers) and Sierra Leonean poet Sydnella Shooter. In *Duch*, the prosecutor quotes Professor Yosef Yerushalmi, ECCC, *the Prosecutor v Kaing Guek Eav alias 'Duch'* (hereinafter *Duch*), 001/18-07-2007-ECCC/TC, Transcript 31 March 2009, opening statement of the Prosecution, p 64. Remarkably, one lawyer noted in response to

importance of stories to international criminal law's identity.¹⁸ The use of the term 'story' does not aim to label these statements as 'unreal' or 'overdramatic', nor to emphasize their non-legal character or to put them outside of the legal discourse.¹⁹ On the contrary, the analysis of opening statements affirms that the narratives they convey are not an uncharacteristic but a quintessential part of what we call international criminal law. Indeed, the opening statement deviates from trial language in other phases of the proceedings and has a somewhat ambiguous status within the legal discourse. But, while usually not obligatory, the opening statement is hardly ever omitted. Apparently, a trial is not complete without an opening statement. That making an opening statement is taken for granted is not a reason to ignore the practice but emphasizes the need for scrutiny. Its ambiguous legal status does not make legal analysis irrelevant but necessary. Following Fleur Johns, this dissertation considers the opening statement as a given that can be turned into a question.²⁰ According to Johns, non-legalities are worth studying exactly because they are 'a central structuring device of international legal thought and work'.²¹ The opening statement awkwardly falls in between legality and non-legality. It is said to belong to the margins of the proceedings because it merely introduces the trial, but it is also a key celebratory moment that surpasses the process.²² Either way, opening narratives are the source and the outcome of legal thought and work, and as such they are worth studying as a part of the legal discourse.

This dissertation aims to identify the defining and remarkable features of this particular narrative form. As every story, the opening statement has certain key elements. In all statements under scrutiny, we can recognize the basic ingredients: time, space, and characters. These ingredients are central to the four core chapters of the book. Together, these chapters illuminate how the opening statement's ambition to tell a coherent and authoritative narrative about the meaning of the trial inevitably creates a story that is inherently unstable and contradictory. All parts look at the way in which opening statements create and reproduce similar tensions: between objectivity and subjectivity, between the universal and the particular, between order and chaos, between

this work on opening statements at the Law and Boundaries conference in Paris (2014) that it emphasized how lawyers are actually 'failed poets'.

¹⁸ On the relation between stories and identity in general see C. Geertz, *The Interpretation of Cultures: Selected Essays*, vol. 5019 (Basic books, 1973). On law specifically, see White (1989). For an interesting analysis about the stories that international (legal) institutions tell about themselves, see M. Koskenniemi, 'The Preamble of the Universal Declaration of Human Rights', in G. Alfredsson & A. Eide (eds.), *The Universal Declaration of Human Rights: A Common Standard of Achievement* (Martinus Nijhoff Publishers, 1999). On the construction of a narrative of ICL institutions specifically, see Kendall and Nouwen (2016); M. Koskenniemi, 'Between Impunity and Show Trials', *Max Planck Yearbook of United Nations Law* (2002) 6; Werner (2014); Schwöbel-Patel (2016).

¹⁹ I would like to follow Simpson, who says about international law that 'the thought that the aesthetic or literary realm ought to be enjoyed elsewhere' is a 'misgiving', Simpson (2015) 15.

²⁰ Johns (2013) 1.

²¹ *Ibid.*, 11.

²² In Johns' terms, both infra- and supra-legality. *Ibid.*, 10.

distance and identification, between the familiar and the novel. Each chapter analyses one component of the opening statement's narrative structure, aiming to uncover the fundamental paradoxes on which it is built. I analyse how the opening statement legitimizes itself,²³ and how it ultimately 'sings the trial into existence',²⁴ not in spite of but due to its inconsistent fundamentals. It is not the primary aim of the dissertation to make generalizing claims about the applicability of its findings to the wider international criminal justice discourse. However, the analysis suggests that the statements both reflect and contribute to a specific set of narratives that international criminal justice institutions tell about themselves. As such, studying opening statements might advance our understanding of how the field makes itself, and assigns meaning to itself.

What is said on the opening day of a trial is revealing in that respect because, typically, every beginning displays a 'retrospective examination of itself.'²⁵ The beginning, which is by definition something new, is paradoxically always also justifying its own pre-existence.²⁶ It needs to appear to be both a start and a continuation; both an established authority and a forum for innovativeness; both open and closed. The possession of such an inherently contradictory character is a crucial feature of the opening statement, and a prominent reason for it to be subject of analysis separate from other legal practices. The beginning as a tool for justification gains special importance in the context of international criminal trials, which face a constant struggle for legitimacy.²⁷ The opening statement has the purpose of setting the scene and presents 'a core narrative that becomes the central interpretive framework of the entire trial'.²⁸ But more than that, the opening statement, as a beginning, can be 'a way of grasping the whole project'.²⁹ Opening statement are carefully crafted, drafted, rehearsed, and performed. Contrary to other trial sessions, they are less fragmented and more story-like; opening statements are only subjected to interference to a limited extent, which leaves a larger degree of control over its final form and content to the prosecutor. As such, it reflects what prosecutors deem important. It reveals what is valued in international criminal law and illuminates the particular ideas and worldviews that underlie the work of international criminal lawyers. By focusing on narratives of legitimation, this

²³ See Glasius and Meijers (2012) 231. Glasius and Meijers claim that '[w]hile the court cases are ostensibly only concerned with establishing the legal guilt or innocence of the accused, the prosecution and the defence are simultaneously constructing narratives about the political legitimacy of the accused as an actor in a past or ongoing conflict, as well as the political legitimacy of the court itself as another such actor.' On the 'turn to narration' in international legal scholarship, see M. Windsor, 'Narrative Kill or Capture: Unreliable Narration in International Law', *Leiden Journal of International Law* (2015) 28.

²⁴ See Chapter 2.

²⁵ E.W. Said, *Beginnings: Intention and Method* (Columbia University Press, 1975), 40. As such, this analysis of the opening statement indirectly has consequences for our understanding of both the author and the audience.

²⁶ Ibid., xxiii and 3; J. Hillis Miller, *Reading Narrative* (University of Oklahoma Press, 1998), 57.

²⁷ See Chapter 2, specifically p. 35 and Chapter 4, specifically section 5.

²⁸ Snedaker (1986) 18.

²⁹ Said (1975) 41.

analysis engages with the paradoxes underlying the self-presentation of international criminal courts and tribunals that become so evident in the moment of beginning. It scrutinizes how specific understandings of history, humanity, perpetrators, victims, and space are invoked and deployed in a story that enhances a particular image of the role and meaning of international criminal law. It sheds light on how trial participants understand their own work but also on how they communicate a particular understanding of cases of mass atrocity and the importance of international criminal trials to particular audiences that are framed to be ‘global.’

The reference to this global reach is one of the features common to almost all opening statements in international criminal trials, and a recurring issue throughout the chapters. The direct and indirect appeal to its audience emphasizes that the opening statement is a social activity; it is told by someone and directed at someone.³⁰ In all statements made in the different courts and tribunals, multiple audiences are addressed for multiple reasons. In the following chapters, it will become evident that the various and multi-layered audiences account for switching focal points throughout the opening statements. The statements are directly targeting the judges and other trial participants but also reach out to victims, affected communities, and the wider international community. The awareness of and focus on an audience broader than the public gallery and the courtroom is, for example, explicitly noted by Judge Fremr, who closes the opening day of the *Ntaganda* case at the International Criminal Court (ICC) with these words:

So at this moment I would like to thank to all speakers for their very informative and impressive presentations that had been delivered in a very dignified manner [sic]. I also believe that these opening statements was very useful and important for public to hear how differently parties and participants see the case at this moment [sic].³¹

³⁰ White (1989) 172. See also Said (1975) 19.

³¹ ICC, *the Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06, Transcript 3 September 2015, p. 76. For similar examples at the ICC see Judge Cotte on the opening day of the *Katanga* case, who repeatedly emphasizes to take into account the persons who are following the proceedings from afar: ICC, *the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-T-80, Transcript 24 November 2009, p. 3, 7, 72; On the same day, Prosecutor Moreno-Ocampo states ‘[t]he people from such places as Bogoro, Bunia, Aveba and Zombe must know that they are not alone, that they do not need to resort to violence again. The Hema, the Ngiti, the Lendu, the people from Ituri, have to feel that they are part of a global community, that we are their brothers and sisters. The Rome Statute is building one global community to protect the right of victims all over the world.’ (p. 3). See also ICC, *the Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Transcript 26 January 2009, opening statement of Victim Representative Mr. Walley, p. 68: ‘I wish through this Court to address those who are listening to us in Bunia and in Ituri, listening to transistor radios or looking at computer screens, be they Hema, Lendu, Alur, or other.’ And ICC, *the Prosecutor v. Jean-Pierre Bemba*, ICC-01/05-01/08, Transcript 22 November 2010, opening statement of the Prosecution, p. 33-34. On the double role of victims as recipients of and contributors to international criminal justice, see Chapter 4.

In a similar vein, the prosecutor in the *Duch* case before the Extraordinary Chambers in the Courts of Cambodia (ECCC) notes that ‘today, in this Courtroom, before the Cambodian people and the world, at long last this process begins and Justice will be done.’³² That even ‘the world’ can be the intended audience signals that the meaning of directing one’s statement towards the ‘affected community’ is contingent; it can encompass specific communities as well as the world community at large.

While the multiplicity of audiences is not specific to the opening statement, the discursive attempt to unify the world culminates on the opening day.³³ Characteristically, opening statements attempt to universalize its underlying morals, motives, and norms, by framing the trial as an effort on behalf of and for the benefit of humanity as a whole. While a ‘world society’, ‘mankind’ or ‘humanity’ is frequently invoked as international criminal law’s main audience and constituency, it is not easy to pin down which entity is targeted exactly.³⁴ One can wonder whether such an entity actually exists and whether it is possible or desirable to understand the world as such. In line with recent work on the meaning of ‘we’, ‘humanity’, and ‘community’ in the international criminal trial context, this dissertation assumes that invoking is an act of creation; by calling on a community, that community is, at least partly, constructed.³⁵ In the case of the opening statement, the specific community that is invoked is one that is receptive of international criminal law, one that shares the values that underpin international criminal trials and, thus, one that legitimizes the tribunal and simultaneously exists by virtue of its invocation at that same tribunal. The goal here is not to make claims about the actual existence of a world community,³⁶ which largely remains an abstract entity, but rather to scrutinize how it is discursively constructed and to shed light on the implications and complications of its invocation. The ‘who is the audience’ question recurs throughout the chapters and illuminates the tension

³² *Duch*, opening statement of the Prosecution, p. 2.

³³ The idea that trials are, besides fora that establish the guilt or innocence of a defendant, also mechanisms of community building is not a new and neither a particular international one. An expressivist approach to law holds that criminal trials assign or affirm norms and values, create collective memory and, thereby, strengthen society. See C.R. Sunstein, ‘On the Expressive Function of Law’, *University of Pennsylvania law review* (1996); M.A. Drumbl, *Atrocity, Punishment, and International Law* (Cambridge University Press, 2007); D.M. Amann, ‘Assessing International Criminal Adjudication of Human Rights Atrocities’, *Third World Legal Studies* (2000); B. de Graaf, ‘Terrorists on Trial: A Performative Perspective’, *ICCT Expert Meeting Paper* (2011).

³⁴ I. Tallgren, ‘The Voice of the International Who Is Speaking?’, *Journal of International Criminal Justice* (2015) 13.

³⁵ L.D. Corrias and G.M. Gordon, ‘Judging in the Name of Humanity International Criminal Tribunals and the Representation of a Global Public’, *Journal of International Criminal Justice* (2015) 13 2; Tallgren (2015); S.M. Nouwen and W.G. Werner, ‘Monopolizing Global Justice International Criminal Law as Challenge to Human Diversity’, *Journal of International Criminal Justice* (2014) 13.

³⁶ According to Koskeniemi a moral appeal to ‘the community’ does not work at the international level: ‘when trials are conducted by a foreign prosecutor, and before foreign judges, no moral community is being affirmed beyond the elusive and self-congratulatory “international community”’. Koskeniemi (2002) 11.

between the universal and the particular that marks all international criminal trials,³⁷ and accounts for the opening statement's constant negotiation between the familiar and the novel, between creation and pre-existence, in time as well as in space.

A focus on the story that is told in the opening statement takes the construction of the audience into account, but such an approach also entails that the analysis is not directly concerned with the effect on the audience, the presumed intention of the author, or the 'actual' meaning of the text. The statements are not assessed in terms of failure or success. The dissertation is not an exhaustive systematic analysis of all opening statement that gives definitive or normative answers about the how and what of doing opening statements; it is not a manual.³⁸ Rather, this dissertation is a collection of observations about the practice and it discusses the recurrent themes and tensions that dominate the opening narratives in different times, at different tribunals, in different settings. The scope of the initial exploration was intended to be as broad as possible in order to search for the parallels, cross-references, and persisting paradoxes that characterize the opening statements of a wide variety of international criminal cases.³⁹ Subsequently, different choices were made in the discussion of the different themes. Therefore, each chapter addresses the relevance of its own selection of cases.⁴⁰

In general, a limited focus on the opening statement of the prosecution provides for a clear subject of analysis: a temporally delineated moment in the trial proceedings that is consistently labelled as the 'opening statement of the prosecution.' However, a limited focus on the opening statement of the prosecution initiates at least two obvious methodological questions: why only opening statements and why only those of the prosecution? One obvious answer is that, as explained above and evidenced by this book, there is enough to say about this specific category of legal texts that has been ignored as a subject of study in its own right. A second answer is that this indeed is a pretty well-defined set of texts and therefore it deserves separate attention. When it comes to selection criteria, there is some truth in Judge Orie's proposition that 'everyone is fully aware of what an opening statement is.' The salience of the category can also be deduced from the fact that it is rather easy to list some of its opposites: opening statements are distinct from for example closing statements and judgments, and those of the prosecution differ from for

³⁷ See Chapter 3, specifically p. 72.

³⁸ Such manual-like texts do exist. For example: J. Carney Jr and M.A. Vitali, 'The Opening Statement', in E. Blumenson & A. Leavens (eds.), *Massachusetts Criminal Practice* (2012); Tanford (2009).

³⁹ Links and references to the raw data (transcripts and videos) can be obtained through the project website: www.theopeningstatement.com

⁴⁰ Chapter 2, p. 36; Chapter 3, p. 61; Chapter 4, section 2, p. 89; Chapter 5, p. 111.

example those of the defence. However, this dissertation does not provide a comparative analysis. The driving force behind this exploration is the wish to illuminate what the opening statements of the prosecution across different times and different tribunals have in common, not to prove the distinctness of the category as such. This does not mean that the analysis ignores the question of boundaries. Sometimes, a comparative excursion helps to better understand how particular elements in the opening statements function. Therefore, chapter 2 and chapter 4 include references to opening statements of the victim representatives; chapter 4 includes statements of the defence as well as a more substantive comparison with closing statements; and a section on opening statements of the defence can also be found in chapter 5.⁴¹

Before turning to the specific outline of the four chapters, this introduction will situate the opening statement within the legal context a bit more precisely by addressing one basic juridical question: what are the rules? The following section will tentatively answer, or rather problematize, this question. In doing so, it sketches exactly the type of vague contours that invite the other chapters to further colour inside but also outside the lines of this feeble legal framework.

3. The rules

In order to set out a tentative regulatory framework on making an opening statement before an international criminal court or tribunal, this section discusses the rules and decisions with regard to the opening statement's procedure and substance of eight courts and tribunals that are, despite some differences in legal foundations, purposes, and geographical focus,⁴² generally considered to make up ICL's institutional landscape: the International Military Tribunal (IMT), the International Military Tribunal for the Far East (IMTFE), the International Criminal Tribunal for the former Yugoslavia (ICTY), The International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone (SCSL), the Extraordinary Chambers in the Courts of Cambodia (ECCC), the Special Tribunal for Lebanon (STL), and the International Criminal Court (ICC).

At the start of most international criminal trials, each party can make an opening statement before the prosecution begins its actual case.⁴³ The International Military Tribunal is the only tribunal that obliged the prosecution to make an opening statement,⁴⁴ but the possibility to

⁴¹ See specifically Chapter 2, p. 54; Chapter 4, section 3-5; and chapter 5, section 2.3, p. 121.

⁴² For example, the IMT and IMTFE are arguably not actual international criminal tribunals. Their rules and procedures however highly influenced the development of the field of ICL, and it would be a rather silly methodological decision to exclude them.

⁴³ ICTY, Rules of Procedure and Evidence (RPE), Rule 84; ICTR, RPE, Rule 84; SCSL, RPE, Rule 84; STL, RPE, Rule 143; ECCC, Internal Rules, Rule 89*bis*; IMTFE Charter, article 15; IMT Charter, article 24.

⁴⁴ IMT Charter, article 24.

enforce parties to make an opening statement was also recently discussed at the ICC.⁴⁵ The prosecution is the first party that appears. Usually, the defence may opt to make its opening statement after that of the prosecution or at the start of its own case.⁴⁶ The ECCC takes a slightly different approach in saying '[b]efore any Accused is called for questioning, the Co-Prosecutors may make a brief opening statement of the charges against the Accused. The Accused or his/her lawyers may respond briefly.'⁴⁷ At the International Criminal Court, the victim representative is also entitled to make an opening statement on behalf of the victims in between that of the prosecution and that of the defence.⁴⁸

With regard to length, regulations vary. Sometimes, opening statements are explicitly required to be brief; the IMT/FE allowed for a 'concise opening statement' and for example the prosecution team in the *Duch* trial before the ECCC was granted two hours for its opening remarks. The SCSL notes that 'the Trial Chamber may limit the length of those statements in the interests of justice',⁴⁹ the ICC argues along similar lines.⁵⁰ The IMT, ICTY, ICTR and STL do not refer to a time limit in procedural documents. At for example the ICTY this sometimes resulted in lengthy openings; the opening of the prosecution in the Milošević trial lasted for two days.⁵¹

As already hinted on in the previous section, few official rules can be found with regard to the content of the opening statements. ICC Regulation 54 indicates that the Trial Chamber 'can issue any order in the interests of justice for the purposes of the proceedings on (...) the length and content of legal arguments and the opening and closing statements'.⁵² The Rules of Procedure and Evidence (RPE) of the SCSL indicate that opening statements must be confined to introducing the evidence. The SCSL Judges in the trial against three Revolutionary United Front (RUF) leaders emphasized that the statement ought to be non-argumentative and non-political.⁵³

⁴⁵ ICC, 'Decision on opening and closing statements', ICC-01/04-01/0, 22 May 2008.

⁴⁶ In RPE of ICTY, ICTR, STL. Although this is not provided for in the SCSL RPE, Judge Boutet noted in *RUF*, Transcript 5 July 2004, p. 16: 'The normal process would be after the Prosecution has made the opening statement and we will turn to each and every Accused and ask them if they wish to make an opening statement at this time reminding them that they don't have to. If they do that now, they will be precluded to making an opening statement after the case for the Prosecution will be closed. So that is the normal process'.

⁴⁷ ECCC, Internal Rules, Rule 89 *bis*.

⁴⁸ ICC, RPE, rule 89.

⁴⁹ SCSL, RPE, rule 84.

⁵⁰ ICC, Regulations of the Court, rule 54.

⁵¹ ICTY, *the Prosecutor v. Slobodan Milošević*, IT-02-54, opening statement of the Prosecution, 12 February 2002 and 13 February 2002.

⁵² ICC, Regulations of the Court, rule 54.

⁵³ For example, Judge Mutanga Itoe who claims: 'I would like to reiterate, like we did in the earlier case, that the occasion to make opening statements is not an occasion to make political declarations. We are in a court of law and we will only tolerate matters to be raised here which are strictly acceptable within our judicial practices and that any

Although not always officially encoded, this is the conventional conception of the opening statement in domestic courts and other international criminal courts and tribunals.⁵⁴ Importantly, as in the domestic tradition, it is often emphasized that the opening statement introduces evidence but is no evidence itself, and it is considered not to influence the final outcome of the trial. As Judge Thomson at the SCSL puts it, ‘the Prosecution's opening statement does not bind the Court, it is not evidence, it is merely a statement of expectations.’⁵⁵ Without going into detail at this moment, it is worth flagging that these rules give rise to complicated questions, for example about the meaning of ‘political’ and the way in which influence can be measured.

From the limited set of rules appears the lack of a consistent idea about the degree of control of the judges over the delivery of the opening statements, often resulting in considerable leeway for the prosecution. Although an extravert or emotional statement might be considered to be bad practice, an international prosecutor will often, as Vasiliev argues:

[U]se this opportunity to offer a concise and eloquent exposition of the merits of her case, seeking to produce an enduring impression on the judges and to focus them on what is coming in the form of prosecution evidence. This turns an opening statement into a potent rhetorical tool by which to embed summary evidence in a broader trial context.⁵⁶

This is also a common reaction of practitioners, who see their opening statements as important moments that allow for a bit more drama.⁵⁷ The documentary *The Prosecutor* provides us with a telling example that illustrates the deliberations of the prosecutorial team on content and style of the opening statement and its awareness of the possible inappropriateness of emotional language.⁵⁸ One scene in the film depicts the rehearsal of the *Lubanga* opening statement that Chief Prosecutor Luis Moreno-Ocampo performs before his team. His colleague Sara Criscitelli warns of the possible objections the defence might raise to the emotional elements of the speech, and she refers to the formal status of an opening statement as being a ‘dry recitation’ of what the evidence will be. Ocampo firmly rejects the notion of ‘dry recitation’, saying ‘it’s about the

statement that tends to be political will be called to order and would, of course, not feature in the records.’ RUF, Transcript 5 July 2004, p. 5.

⁵⁴ See Vasiliev (2012) 37; Tanford (2009); Carney Jr and Vitali (2012).

⁵⁵ RUF, Transcript 5 July 2004, p. 6. See also Judge Kwon in ICTY, *the Prosecutor v. Radovan Karadžić*, IT-95-5/18-T, Transcript 27 October 2009, p. 511 and Judge Fremr in ICC, *the Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06, Transcript 2 September 2015, p. 10.

⁵⁶ Vasiliev (2012) 38.

⁵⁷ This appeared from responses to presentations of this research at conferences and from informal conversations between the author and several international prosecutors.

⁵⁸ Stevens (2010).

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people, so we have to convince the world, that this is awful.' He is prepared to take the risk of being 'over-dramatic'. Another colleague, trial lawyer Nick Kaufman adds to Moreno-Ocampo's words that 'momentous occasions deserve momentous speeches' and refers to the 'extremely emotional' opening statement in the Eichmann trial.

Judge Mutanga Itoe of the SCSL explains the ruling over content as follows:

[I]t would seem to me that this Chamber may not even have a way of controlling the content of opening statements, whether the Prosecution and whether the Defence [sic], except to say, that every opening statement must conform to Rule 84, but in terms of the language, how -- the level of rhetoric, the kind of oratory that is adopted, I am not sure whether we can inject some kind of judicial control over that.⁵⁹

Therefore, much is left to the discretion of the parties, which can be interpreted rather widely. In the *Haradinaj* case, Judge Orie notes that:

The parties have, well, a wide discretion in formulating the opening statement, the evidence to be presented as they wish, and the Chamber, of course, there's no need to start every sentence by saying, "The evidence will show that," because that would not only be boring but be repetitious as well. But I think that everyone is fully aware of what an opening statement is. I would like to add to that that where, in strict jury systems, an opening statement is really limited to facts and nothing else, and, of course, an opening statement here addresses the Chamber, the Chamber who is not only a trier of fact, but also deals with legal matters. So where it's of no use to address the jury with legal matters in an opening statement, that might be different here. I take it that, everyone being at a high professional level, is fully aware of what is expected at this stage of the proceedings.⁶⁰

Later, he emphasizes again that it is not solely up to the judges to decide on the limits of the opening statement, even expressing some lenience with regard to the inclusion of political elements by saying:

[W]e are old enough to know that these kinds of cases involving accused, sometimes with a political background as well, these kinds of cases in which we find often a

⁵⁹ RUF, Transcript 5 July 2004, p. 33.

⁶⁰ *Haradinaj et al.*, Transcript 5 March 2007, p. 357.

mixture of individual behaviour but sometimes linked to political aspirations - I'm not saying in this case - but to draw the line between pointing at and addressing political elements involved in the case and political statements is not always that easy to draw exactly where that line is [sic]. But, of course, this Chamber could not expect anything else from the Prosecutor before this Tribunal to wisely find that line for herself.⁶¹

However, not only prosecutors and judges can exercise control over the opening statement, other parties might attempt to do so as well. In the *Duch* trial a discussion unfolds during the prosecution's opening statement when the defence interrupts. The prosecution reminds the court of its previous ruling against interruption by other parties, while the defence considers their interruption to be an objection, which according to them is allowed.⁶² At the SCSL too, we find objections of the defence against the emotive language used. In both cases, the judge overrules the objection. In *Milošević*, the judge emphasizes that no questions about the content of the opening statement can be asked.⁶³ Objection seems to be possible but it is no undisputed practice. Again, this allows for a degree of latitude that is unique to the opening statement.

A related regulatory point of discussion is that of disclosure. The Chamber of the ICC decided that, if parties intend to make an opening statement, an outline must be furnished to the Chamber and the other parties seven days in advance.⁶⁴ In a dissenting opinion accompanying the decision, Judge René Blattmann resists the decision on disclosure for it 'takes away an important element of spontaneity which may undermine the goal of the trial to search for truth.'⁶⁵ This discussion characterizes the uncertain status of the opening statement: if a statement is no evidence, why should it be disclosed? If it should be a dry presentation of evidence, why should it to be spontaneous and surprising? Moreover, these issues directly relate to the earlier mentioned audience question, who is formally and actually addressed by the opening statement?

An interesting discussion in that regard unfolded when the defence in the *RUF* case at the SCSL wanted to place a formal objection to expressions such as 'army of evil,' 'dance with the devil,' and 'ruin was their motto, destruction was their creed,' that were uttered in the first part of the opening statement of the prosecution. To this repeated objection, the Judge responded as follows:

⁶¹ *Haradinaj et al.*, Transcript 1 March 2007, Pre-Trial Conference, p. 342-3.

⁶² *Duch*, opening statement of the Prosecution, p. 15-16.

⁶³ ICTY, *the Prosecutor v. Slobodan Milošević*, IT-02-54-T, Transcript 13 February 2002, p. 215.

⁶⁴ ICC, 'Decision on opening and closing statements', ICC-01/04-01/0, 22 May 2008.

⁶⁵ *Ibid.*, p. 10.

If you are saying that those passages are objectionable, which, of course, I am not suggesting that we can't argue about that, would it not be proper to look at the issue from the perspective of the composition and the ability and the capability of the Tribunal of fact. I would readily, as a lawyer, agree with you that some parts of the opening statement may well be using language of an emotive nature, in other words, a little on the high side from an emotive perspective. But wouldn't that be more relevant in the context of a jury trial where jurors may well be carried away by the high emotive tone of an opening statement where perhaps sometimes it is difficult to know whether jurors may well determine guilt or innocence on the basis of the opening statement of the Prosecution, plus the evidence and vice versa. The objections here would seem to me to fade into insignificance considering that this panel comprises judges who, by their training and education, are expected not to be carried away by emotionalism and hyperbolic statements, if you want to call them that, about crime situations.⁶⁶

Clearly, the judge is making a firm statement about what the intended audience of the opening statement should be: a learned audience of judges. When the defence counsel consequently notes that 'the damage is already done', the judge adds:

Let me assure you, Mr. O'Shea, no damage is done, this is a Bench we know what we are looking for and we know how to get around what we are looking for. And if you are measuring your damage in terms of public imagery, well that is entirely your business, but I think that the damage which should be of a lot of concern to you is what the Court perceives from the statement of the Prosecution.⁶⁷

In other words, this judge asserts that the public might be fooled by the opening rhetoric, but the judges are not. And, moreover, he flags that the public image is not and should not be the trial participants' primary concern; the judges are the only relevant audience. This contravenes the previously cited explicit references to external audiences of for example Judge Fremr at the ICC.⁶⁸

Although we can say that the opening statement of the prosecution is a consistent element in international criminal trials, there does not seem to be a consistent set of rules with regard to its status and form. But, despite the lack of clear rules, the statements show a rather consistent form, tone, and a steady invocation of similar themes over time and across tribunals. When considering

⁶⁶ RUF, Transcript 5 July 2004, p. 32.

⁶⁷ RUF, Transcript 5 July 2004, p. 33.

⁶⁸ *Supra* note 31.

the claims about law's public imagery alongside the limited function of the opening statement that is assigned to it by formal rules, and keeping in mind the skewed analogy with the function of domestic opening statements that are often directed at a jury, questions come up about the purpose of the statements. If there is no jury to persuade, if public imagery is not relevant to the court,⁶⁹ if judges are not influenced by the opening statement,⁷⁰ if the opening statement carries no legal meaning at all, why then does it still feature at the beginning of every single international criminal trial? And, more important to this research, what stories are the statements telling us, and how? The sketchy legal framework and the prevailing idea that 'everyone is fully aware of what an opening statement is' reflect both the legal and the non-legal character of the opening statement and allow for the interesting balancing act on the boundary between the formal and the sensational, between law and non-law, that makes it such an intriguing practice.

4. The mise-en-scène

In order to explore the story told in the opening statements of international criminal trials, this dissertation proceeds with a rather traditional literary dissection of topics. The four chapters that follow each discuss a dimension in the statement of the prosecution that maps onto one of the classical ingredients of a story: time, place, and characters. The set-up of this dissertation is article based; chapter 2 and 4 have already been published elsewhere in a slightly different form, and at the time of writing, chapter 4 and 5 are under review.⁷¹ However, although all pieces have a different focus and address their own methodology, they are closely connected and work in tandem in their aim to uncover the persisting tensions in the opening statement's story. This means that the chapters can be read as standalone pieces but also as one narrative.

Chapter 2 discusses how the opening statement locates itself in time, specifically through the invocation of its own history. This temporal logic comes down to the exploitation of the fundamental tension between novelty and tradition, which enables a presentation of the trial as a turning point in time. In that sense, the opening statement perfectly displays the characteristic existential crisis of a beginning that addresses both its own newness and its pre-existence.⁷²

⁶⁹ That public imagery is actually very relevant to international criminal courts and tribunals is forcefully argued by Christine Schwöbel-Patel (2016). See also Dobson and Stolk (2016).

⁷⁰ On the influence of the opening statement on jurors see Spiecker and Worthington (2003); Pyszczyński and Wrightsman (1981). To my knowledge, no experimental research has been conducted to the effect of the opening statement on judges and verdicts at *international* criminal courts and tribunals.

⁷¹ An overview can be found on page 145.

⁷² See *supra* note 26.

The second ingredient of a good story is a place; nothing can happen nowhere. Place in this context means the way in which the opening statement locates itself spatially. In an international courtroom, space and place are contested and mean multiple things. Specifically, every proceeding requires details on the location of the events on trial. In general, every tribunal has to consider where, physically, the trial has to take place. Moreover, the international criminal justice field continually discusses its spatial focus with regard to cases, victims, defendants, and audiences. Chapter 3 discusses an apparently innocent and frequently used item in international criminal courtrooms in which all these spatial questions are compressed: the map. The way in which cartography is inserted in the opening narratives in order to bridge but also preserve the distance between the global court and the 'local' events that are on trial, illuminates the embedded tension between the universal and the particular, and, again, a (con)fusion of audiences that characterizes the opening statement.

Chapters 4 and 5 discuss the last ingredient, characters. Traditionally, the main characters of a story are divided into a protagonist and an antagonist. Such clear divide cannot be applied straightforwardly to the opening story of the prosecution. The main characters are the defendant and the victims, but the focal point shifts throughout the statements. Criminal trials are traditionally said to be centred on the defendant.⁷³ However, the defendant is intuitively more of an antagonist; especially in light of the increasing demand on international criminal trials to be victim-centred.⁷⁴ But the victims are equally unlikely protagonists, for they tend to stay rather passive and abstract in the opening story.⁷⁵ And there are other candidates competing to be the centre of the story, for example humanity, the law, or even the prosecutor herself.⁷⁶ Instead of deciding on who is who by attaching familiar literary labels, chapters 4 and 5 show how the moment of beginning an international criminal trial produces contradictory narrative conditions and problematic dualities. They examine the recurring character constructions in opening statements and discuss how these specific constructions come about, what they do in the narrative of the prosecution, and how they contradict themselves.

⁷³ A. Duff, 'Authority and Responsibility in International Criminal Law', in S. Besson & J. Tasioulas (eds.), *The Philosophy of International Law* (Oxford University Press, 2010); P. Akhavan, 'The Rise, and Fall, and Rise, of International Criminal Justice', *Journal of International Criminal Justice* (2013) 11 533. On the tension between the focus on individual responsibility and a focus on the wider context in international criminal trials, see Koskeniemi (2002). See chapter 5.

⁷⁴ See chapter 4, p. 83.

⁷⁵ Also, in line with Kendall and Nouwen's study of international criminal law's abstract Victim, this protagonist would mainly be an abstract figure whom we can neither deny nor really identify with. S. Kendall and S. Nouwen, 'Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood', *Law and Contemporary Problems* (2013) 76.

⁷⁶ These considerations open up a Pandora's box of representation, a crucial challenge for international criminal trials that is discussed throughout the chapters. See specifically Chapter 4, p. 98.

Chapter 4 discusses how victims of mass atrocity are, especially in the opening statements at the ICC, typically presented as both a passive recipient and an active contributor to the truth about what happened. This dual, at times conflicting, depiction appears to be the consequence of the two mutually disrupting aspirations of international criminal trials. On the one hand, these trials seek to be victim-centred, by including victims' voices and experiences of suffering in court. Simultaneously, they aim to speak with an authoritative 'legal' voice that adheres to procedures, strict limits on the use of emotional language, and a focus on the facts of the case.

In chapter 5, the defendant appears to be the crucial figure in the prosecutor's attempt to remedy the tension of international criminal trials that address evilness beyond human comprehension while simultaneously wanting to adhere to the rational human agent principles of criminal law. This process of simultaneously humanizing and dehumanizing the defendant results in a stereotypical 'ideal perpetrator' that is, paradoxically, human and inhuman at the same time.

Ultimately, this dissertation aims to magnify the story of the opening statement there where it becomes ambiguous, circular, repetitive, self-referential, incomplete and inescapable. It aims to uncover the specificities of a discourse that is built on and rebuilds paradoxes, to illuminate some of the absurdities that mark the foundations of the opening statement's celebration of reason. Above all, it shows how the opening statement aims to provide certainty when there is none. As Saïd notes, 'the more crowded and confused a field appears, the more a beginning, fictional or not, seems imperative. A beginning gives us the chance to do work that compensates us for the tumbling disorder of brute reality that will not settle down.'⁷⁷ This dissertation studies the way in which the opening statement attempts to comfort a hurt humanity, the way in which it authorizes the trial of which it is part, what it promises, and, moreover, what this endeavour to discursively overcome chaos obscures.

⁷⁷ Saïd (1975) 50.

